per se a substitute, are, in the nature of things, an imperfect remedy. See also 12 MICH. L. REV. 491; 8 id. 142.

FISHING—CONFLICT WITH RIGHT OF NAVIGATION.—In an action for damages against the owner of a vessel for running through a fishing trap, *held*, that the instruction of the lower court, to the effect that "it was the duty of the defendant to operate and navigate his vessel in the channel or usual course in which vessels said river should be navigated" was erroneous, since the failure so to navigate is not negligence in itself, but merely evidence of negligence. *Anderson* v. *Columbia Contract Company* (Ore., 1919), 184 Pac. 240.

The court found, however, that one exercising the right of navigation is bound to use ordinary care and due regard for the property rights of fishermen. This is an interesting development of the old rule as laid down in an anonymous note reported in 1 Camp. 517, where it was stated that if the navigator acted maliciously and wantonly the plaintiff was entitled to a verdict, but not otherwise. In *Post* v. *Munn*, 1 South. (N. J.) 61, 7 Am. Dec. 570, the first of the American cases on the subject, the necessity of wantonness and malice, in order to hold the master of the vessel liable, is at least strongly implied. *Cobb* v. *Bennett*, 75 Pa. 326, and *The People's Ice* v. *The Steamer Excelsior*, 44 Mich. 229, are substantially in accord. See also, *Hopkins* v. *Norfolk and Southern Railroad Company*, 131 N. C. 463, and *Jones* v. *Keeling*, 46 N. C. 299. *Wright* v. *Mulvaney*, 78 Wis. 89, takes the first step toward the more liberal doctrine. There the defense maintained that because of the paramountcy of the right of navigation, the defendant could not be held liable except for wantonness or intentional wrong, and cited *Post* v. *Munn*, *Cobb* v. *Bennett*, *supra*, and GOULD, WATERS, § 87. The court did not attempt to negative the doctrine referred to there, but held that the rule derived from them was to the effect that the master of the vessel is liable for damage to fishermen if he has acted wantonly and maliciously, and has done unnecessary damage. Since the defendant in this case could have avoided the net by using even slight care, the court decided the damage had been unnecessary, and that the defendant was liable even though the hitherto important element of wantonness and malice were lacking. *Horst* v. *Columbia Contract Company*, 89 Ore. 344, decided a year before the present case, against the same defendant, went so far as to hold that reasonable care was necessary on the part of those in charge of the steamboat to prevent doing injury to the plaintiff's boat and net. This decision may have been affected to some extent by the fact that the plaintiff, in addition to fishing, was exercising a right of navigation, though one subservient to that of the larger craft. It is worthy of note that the rule of the present case was approximated as early as 1860 in a Canadian case, *Foley* v. *Wolhaupter*, 4 Allen (N. B.) 90 and 167, where it was held that the navigator was liable for negligence, and that wantonness and malice were not important factors. Two of the judges in this case went so far as to lay down the dictum that in their opinion, the right of fishing was just as important as the right of navigation. No American court has gone so far as to question the paramountcy of the

right of navigation. A consideration of the relatively vast importance of the right of fishery both in New Brunswick and in Oregon, where the principal case was decided, may throw some light on the modification of the old rule in these cases.

HIGHWAYS—LIABILITY OF TRACTION COMPANY FOR OBSTRUCTING HIGHWAY UNDER ORDERS OF COUNTY COMMISSIONERS.—Defendant traction company dumped dirt on the highway along which its tracks ran; it did this under orders from the county road commissioners, who wished to use the dirt for the repair of another road which intersected the highway at a point near where the dirt was dumped. No light or other danger signal was placed on the dirt, and plaintiff was injured by running into the pile of dirt in the night-time. *Held* (by a divided court), that defendant company was not liable, as it had merely done a lawful act in a lawful manner, under orders from a competent public authority. *Shepard* v. *Utah Light & Traction Co.* (Utah, 1919), 184 Pac. 542.

It is clear that a person who wrongfully places an obstruction in a highway becomes liable to persons sustaining injuries thereby. *Dixon* v. *Ry.*, 100 N. Y. 170; *Dunlap* v. *Ry.*, 167 N. C. 669. But under the Utah statutes the county officials had the right to obstruct this highway temporarily for the purpose of repairs, and this right was paramount to the right of the public to uninterrupted travel; *Lund* v. *St. Paul etc. Ry.*, 31 Wash. 286; *Stern* v. *Spokane*, 73 Wash. 118. The court held that this was equally true though the material was to be actually used in repairing another highway; and, there being nothing unlawful *per se* in the manner of delivery by the defendant, and the latter acting only under the direction of the county, its act was also lawful. The holding is that the whole act was justifiable, except as to the negligence of the responsible county official in failing to put up danger signals, which was said to be the proximate cause of the accident. The county was not a party in the present case, and, under the Utah law, would be immune from any such action as the present. The defendant was considered as a mere instrumentality of the county, and is expressly distinguished from an independent contractor. The dissent proceeds on the ground that public officials must not interfere with the use of a highway to any greater extent than is absolutely necessary; that it was not absolutely necessary to dump this dirt at this place on the highway in question, for the repair of another highway, though it probably was convenient to do so; that, therefore, the act of the county was unlawful and that of the defendant, acting under the county, was equally so. This doctrine was also recognized in *City of Louisville* v. *Tomkins* (Ky.), 122 S. W. 174. A municipal corporation undoubtedly has the right to close a street or highway temporarily under certain conditions. The real question here seems to be whether such obstructions must be limited to those which are absolutely necessary, or whether the doctrine of reasonable necessity should apply. It is submitted that the doctrine of reasonable necessity is based on more sound reason and would work out more equitably. As applied to abutting owners this right was held to be limited by reasonable necessity in *Mfg. Co.* v. *N. Y. etc. Ry.*, 76 Conn. 311.